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CUMULATIVE CHARACTER OF WORKING TIME FEATURES. CONSEQUENCES ON DELIMITING WORKING TIME FROM REST TIME

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Abstract: *The article presents an analysis of the provisions of Directives 93/104/EC and 2003/88 and of the case law of the Court of Justice of the European Union, which supports the conclusion that the characteristic features of working time must be cumulatively met so that a time frame falls within this category. Next, the importance and consequences of this requirement are outlined regarding the process of delimiting working time from rest time.*

Keywords: *working time, rest time, cumulative features*

1. Cumulative character of working time features

Beginning with Directive 93/104 / EC[1] and continuing with Directive 2003/88 on certain aspects of the organization of working time, the purpose of European Union regulation was to promote and ensure safety and health at work[2]. A problem posed by the definition of working time covered by European Union regulation, which is very important for its delimitation from rest time, was whether, in order to qualify as working time, a period must cumulatively fulfil all the conditions indicated in the definition content or only part of them.

The European Commission, in a proposal to amend Directive 93/104, stated that the three conditions must be met cumulatively[3]. The Luxembourg Court finally concluded that all the features must simultaneously exist but how it came to that conclusion and the consequences of adopting this solution are best derived from the analysis of the Court's case-law.

Thus, the adoption of this solution has led the Court to a significant interpretation effort in order to reach the conclusion that certain periods should be included in

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[1] Concerning certain aspects of the organisation of working time (JO L 299 p.9).
Article 2 -Definitions
„For the purposes of this Directive, the following definitions shall apply:
1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.
2. "rest period" means any period which is not working time;".

[2] CJEU, judgement of 1 December 2005, Second Chamber, case C-14/04, Abdelkader Dellas, ea ECLI:EU:C:2005:728, par.41; available at www.curia.eu.

[3] European Comission, Communication [...] on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC, COM (1998)662 final – Explanatory memorandum, publicată în limba engleză la *ec.europa.eu/social/BlobServlet?docId=2933&langId=en,* p.12 pct.6.

working time, despite national laws and practices in the Member States. That determined, in some cases, the analysis to be less structured, the appreciation to be global and the conditions not to be individually analyzed and to be considered fulfilled through each other, which results from the analysis of the jurisprudence evolution.

Even from the SIMAP[4]case and subsequently in the Jaeger case[5], the question arises as to whether there are three characteristic features of working time and whether they must be considered distinctly and cumulatively met, or the assessment whether or not to include a period during working time or rest time should be made in a global manner, being sufficient to fulfil only some of the features indicated in the definition given by the Directive, the conclusions of the Advocates-General in the two cases being relevant[6].

The problem arose at the time when the situation had to be analyzed for periods of time that did not clearly meet all three features but only a part of them, such as periods of on-call service or continuity, periods that were considered at most as falling within an intermediate category, which does not constitute either working time or rest time, and in any event were not considered to be working time in most Member States[7].

This question has been raised from the outset also in the case of the duration of the transportation to the workplace, as most of the member states exclude this period from working time, others treat it in a special regulation (e.g. France) and in others it is considered, at least by some of the employers, working time[8].

In principle, the distinction was made according to the degree to which the employee had to be in the workplace and the circumstance if he actually did work

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[4] CJEU, judgement of 3 October 2000, case C-303/98, Sindicato de Médicos de Asistencia Pública (Simap) c. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, par.30-38, available at www.curia.eu.

[5] CJEU, judgement of 9 September 2003, *case C-151/02, Landeshauptstadt Kiel c. Norbert Jaeger, ECLI:EU:C:2003:437* available at www.curia.eu.

[6] Advocate General Saggio, in the opinion presented in SIMAP case, argued that the requirement of cumulative fulfillment of the three criteria is difficult to reconcile with the purpose of the Directive because it would involve the exclusion from working time of the periods in which the employee carries out his specific activities but is not the place of work or periods during which the employee is at work but do not fulfill his obligations while at the employer's disposal - Opinion of Advocate General Saggio delivered on 16 December 1999 (1) Case C-303/98, Sindicato de Médicos de Asistencia Pública (SIMAP) v. Conselleria de Sanidad y Consumo de al Generalidad Valenciana, ECLI:EU:C:1999:621, available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d59826f5d68d4942f79d4984a44a4a0406, par.34; the same reasoning was put forward in Jaeger case by Advocate General Ruiz-Jarabo Colomer, who, continuing Advocate General Saggio's argument, also stated that the three defining criteria of working time are autonomous, considering that the Court also have taken in consideration that solution in paragraph 48 of the judgment in SIMAP case, and that, in order to achieve the purpose of the directive, it is necessary to define extensively the concepts contained in Article 2 of the Directive in order to include all the cases which may arise in practice and not being necessary all three features to coexist in order to include a period of time in the duration of working time- Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 8 April 2003 (1) Case C-151/02, Landeshauptstadt Kiel v Norbert Jaeger, ECLI:EU:C:2003:209, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=48191&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=190152, par.28.

[7] European Commission - State of implementation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, COM(2000) 787 final, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0787&from=EN, p. 7; in French case law there was made the difference between home on call and on call periods at work place – see Supiot, Alain. "Temps de travail: pour une concordance des temps." Droit social (1995) p. 950.

[8] eg UK, see Berg, Peter, Gerhard Bosch, and Jean Charest. "Working-time configurations: A framework for analyzing diversity across countries." ILR Review 67.3 (2014), p. 807.

during the availability period, being considered working time only when the work is actually done not only by Member States but also by the Commission[9].

As the Court expressly ruled out this possibility in its judgment in SIMAP case and Jaeger case it became necessary to find a solution for the delimiting working time by rest time in such cases.

The solution proposed by the Advocates-General in SIMAP case and Jaeger case was coherent and would solve a series of problems that arose later. However, the opinion of the Advocates General was contrary to the Commission's view that, in a proposal to amend Directive 93/104 of 1998, stated that it was clear that the three characteristic features of working time are cumulative[10].

In the case of SIMAP, where this issue was raised for the first time, the CJEU, while accepting the Advocate General's opinion on the solution, also did not accept the solution to the question of cumulative character. It is true, however, that the Court has not established the opposite. In that case, the Court confined itself to finding that all three characteristic features of working time were nevertheless met, which made it unnecessary to debate the question of the need for cumulative fulfilment of those, noting that the first two criteria were met and the third was fulfilled *de facto* from the fulfilment of the first two[11].

However, on the one hand, considering that in that case the worker "carries out his work or performs his duties" by being in the workplace and at the disposal of the employer to carry out his work at any time, the Court did not analyse, in reality, this condition in an individualized way and has not established for it an independent content.

On the other hand, it has created for the future the possibility that the analysis actually targets only two of the defining features, the third resulting implicitly, although all three features are formally analysed. This method of analysis was subsequently used in the Jaeger[12] *case, consolidating the jurisprudence of the SIMAP and CIG*[13] *cases.*

In its subsequent case-law, the Court continued to analyze all three defining features of working time so that, in the TYCO case, it would carry out an analysis of them with a greater degree of systematization, in the sense that it refers separately to each of those features, analysing if they are met, which leads to the conclusion that the Court's opinion is certain that all three traits must be met[14].

We cannot agree with the contrary view expressed in the recent doctrine that the requirement for the worker to be at the employer's disposal "prevails over the others", a

[9] Opinion of Advocate General in SIMAP case, cited, par. 33.

[10] European Commission, Communication [...] on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC, COM (1998)662 final – Explanatory memorandum, available at *ec.europa.eu/social/BlobServlet?docId=2933&langId=en,* p.12 pct.6.

[11] Judgement in case SIMAP, cited, par. 48.

[12] Judgement in case Jaeger, cited, par. 65.

[13] CJEU, 6th Camber,Order of 3 July 2001, *case C-241/99, Confederación Intersindical Galega (CIG) c. Servicio Galego de Saúde (Sergas), ECLI:EU:C:2001:371, par.33 şi 34.;*

[14] of the same opinion also Del Giudice, F., Izzo, F, Solombrino, M. – Manuale di diritto del lavoro, ed.XXXIV, Editura Simone, Napoli, 2016, p.244; Gheorghe, Monica, *Timpul de muncă. Realităţi şi perspective, volumul Actualităţi şi perspective în legislaţia muncii – Conferinţa Sibiu 2015, Ed. Universul Juridic, 2016,* p.141, citing also Rodière, P., Droit social de l'Union Européenne, 2014, p.134.

conclusion supposed to result fromparagraph48 and 58 of the CJUE judgment in Dellas case[15], paragraph.28 of the judgment in Vorel case[16] and paragraph 36 of the judgment in TYCO case[17].

On the contrary, the paragraphs cited are part of an integrated analysis of all three features of working time, as it has been shown, and paragraph 36 of the TYCO judgment is part of the analysis of the condition that the worker is at the disposal of the employer after the Court, in paragraph 30-35 analyses the condition for the worker to exercise his / her activities or functions and in par.43-46 the condition for the worker to be at work is analysed. Then, although in paragraph 58 of the judgment in Dellas, it is stated that it is sufficient for the worker to be available to the employer for a period of time to qualify that period as working time, but the conclusion is expressed by claiming that this qualification does not depend on the intensity of the work and refers to the period during which the worker is at work, on the assumption that this condition, which the Court expressly refers to in paragraph 48 of the judgment, is fulfilled. Toward the same conclusion leads paragraph 28 of the judgment in Vorel case, in which the Court finds that is satisfied the requirement that the worker is at work, explaining then the reason why the condition for performing his duties is also fulfilled.

In these very cases, the CJEU has made a significant effort to explain that all the defining features of working time are met, developing the notions contained in the definition.

The CJEU has never established that the working time feature of staying at the employer's disposal would prevail over the other characteristics, but on the contrary, has checked the fulfilment of all these defining features. As it has been shown, since the SIMAP case was settled, it was noted that although the worker is at the disposal of the employer, the period at which he is at home is not working time, clearly resulting that the failure to meet the conditions of being at work is equally important. As a result, it has been shown that 'relevant to qualifying the respective period of time as work or rest is not only the obligation of the employee to remain available but also the place where that obligation is fulfilled' in the sense that, in principle, if that place is in the space belonging to the employer the period is working time and if the place is outside these spaces the period constitutes rest time[18].

However, in order to maintain this line of case-law, the Court has come to the point of trying to explain why one or other of the features of working time can be found for a certain period of time and so, ultimately, it found that one or other of the features exists implicitly.

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[15] CJUE, judgement of 1 December 2005, case C-14/04, Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière c.Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité, ECLI:EU:C:2005:728, available at www.curia.eu; see also R. Anghel, *Timpul de lucru şi timpul de odihnă – Jurisprudenţa Curţii de Justiţie a Uniunii Europene,* Universul Juridic 2017, p.172 – 176.

[16] CJEU, 5th Chamber, Order of 11 January 2007, case C 437/05, Jan Vorel c. Nemocnice Český Krumlov, ECLI:EU:C:2007:23, available at www.curia.eu.

[17] Panainte, Septimiu Vasile, Drept european al muncii, Ed. Hamangiu Bucureşti 2017, p. 244; Panainte, Septimiu Vasile, Dreptul individual al muncii – curs universitar, Ed. Hamangiu Bucureşti 2017, p.210.

[18] Dimitriu, Raluca, *Consideraţii în legătură cu flexibilizarea timpului de muncă al salariaţilor,* Revista Dreptul nr. 7/2008, p.124 and also, in different context on p.123.

A good example of this is precisely the judgment in TYCO case, because in this case the Court opted for a seemingly structured analysis of each feature and not for a global analysis that would have allowed for a less structured evaluation and would have avoided redundant elements.

Thus, in the TYCO case, although it refers to the 'first constituent element of the working time', the Court begins the analysis with the condition that the worker exercises the activity or functions, which is the third element in the definition, the option being considered in the doctrine original and unpredictable but probably determined by the mobile nature of the workers concerned[19].

The Court then retains the condition that the worker is automatically placed at the workplace by fulfilling the first condition[20], in order to adapt the features of working time to the characteristics of mobile workers[21].

As it has been pointed out in the doctrine, the definition of working time could envisage the determination of the alternative character of the characteristic features[22] or at least the need to assemble only two of them.

However, at this state of the CJEU case law, it is clear that the three characteristic features of working time are cumulative and not alternative[23].

2. Consequences on delimiting working time from rest time

As the characteristic features of working time must be met cumulatively, if at least one of the defining features of working time is not met, that period should be considered rest time, the two notions being mutually exclusive[24].

Thus, since the CJEU has already established that it is not sufficient for the worker to be at the employer's disposal (for example by performing on-call duty) but at his own home / residence or other place freely chosen by him[25], it can be concluded that it is also not enough that the worker is only present in the workplace for the period in which he is in that place to be considered working time as the condition that the worker is at the employer's disposal when, at the workplace, when not working, is considered

[19]Fabre, Alexandre, "*Le temps de trajet des travailleurs nomades devant la Cour de justice: la mobilité vue de plus haut.*" Droit Social 1 (2016), p.60.

[20] par.43 of judgement in case TYCO.

[21]Fabre, Alexandre, *"Le temps de trajet des travailleurs nomades devant la Cour de justice: la mobilité vue de plus haut.*" *Droit Social* 1 (2016): p.61.

[22]De Groof, Sarah, "*Travelling Time is Working Time According to the CJEU... at Least for Mobile Workers.*" European Labour Law Journal 6.4 (2015), p.391.

[23] on the same opinion also Del Giudice, F., Izzo, F, Solombrino, M., *Manuale di diritto del lavoro*, ed.XXXIV, Editura Simone, Napoli, 2016, p. 244 and Roşioru, Felicia, *Dreptul individual al muncii*, Ed. Universul Juridic, Bucureşti, 2017 p.412.

[24] CJUE, C-303/98, judgement of 3 October 2000, *SIMAP*, cited., par.47.

[25] CJUE, judgement in case SIMAP, cited, par. 50; on the contrary, if the obligations imposed on the worker are such as to objectively restrict his ability to pursue his personal and social interests by being obliged to remain in a restricted area, it follows that he is in a place imposed by the employer by default and the on-call time at home is working time – see CJEU – 5th Chamber, judgement of 21.02.2018 in case C-518/15, Ville de Nivelles c.Rudy Matzak, available at www.curia.eu and R. Anghel, *Perioada de gardă la domiciliu poate constitui timp de lucru. Nuanțări recente în jurisprudența Curții de Justiție a Uniunii Europene*, Curierul Judiciar, nr.3/2018, pp. 150-154.

by the Court to be necessary for the inclusion of a certain period of time in the category of working time[26].

During the planned periods of work interruption, although the worker may still be at work, he is not at the employer's disposal and in the exercise of his duties or functions, even if he may exceptionally be required to resume work[27] because this interruption of work is not incompatible with making any eventual and exceptional interventions required by the employer in the appropriate timeframe, if necessary, such as for security reasons (in which case the intervention itself will be taken into account when determining the duration of actual work)[28]. Thus, such a theoretical possibility was considered by the CJEU as insufficient to determine the inclusion of a period of time during working time[29].

In Grigore case[30], the Court held that, in interpreting Article 2 (1) of Directive 2003/88, the classification of a period as "working time" "does not depend on the provision of tied accommodation within the range of forest within that forester's purview in so far as that provision does not imply that he is required to be physically present at the place determined by the employer and available there to his employer so that he may take appropriate action if necessary". From the reasoning of the judgment, it follows as a principle that the existence of a dwelling space in the space which constitutes a place of work is not such as to lead to the conclusion that the time spent by the worker in the dwelling is neither working time nor rest time, and the Court stated that the criteria already set out in its case-law must be applied in order to delimit working time from rest time in this case[31].

Starting from the cumulative character of the three defining features of working time, the immediate conclusion would be that, when the worker is at work, it is sufficient for a period not to be regarded as working time either the employee not to be at the employer's disposal or not to exercise his / her duties. Although theoretically, such a possibility cannot be ruled out, in practice, it may be necessary rather that none of these two defining features are present because, as has been shown, the CJEU has come to the conclusion several times that the existence of one of these, combined with the presence at the workplace, also attracts the fulfilment of the other. From this perspective alone, there is another conclusion, namely that none of the two features should be met[32].

A similar situation is found in the regulation of sectorial directives in the field of transport activities where, in view of the specific nature of the activities which prevent the worker from moving daily at home / residence, certain periods of time, which certainly have the purpose of restoring work capacity, are included in rest time and are consequently excluded from working time even though the worker is still in a place imposed by the

[26] CJEU, judgement in case SIMAP, cited, par. 48.
[27] see R. Anghel, *Delimitarea timpului de lucru de timpul de odihnă şi remunerarea muncii suplimentare şi de noapte în cazul personalului militar voluntar*, Curierul Judiciar nr.2/2018 pp.70-76.
[28] Cour de cassation, Chambre social, audience publique du 28.05.2014, n° de pourvoi 13-10544, audience publique du 28.05.2014, n° de pourvoi 13-13996 available at www.curia.eu www.legifrance.fr;
[29] regarding home on call see the judgement in case SIMAP, cited, p.50.
[30] CJEU (6th Chamber), Order of 04.03.2011, in case C-258/10, Nicuşor Grigore v Regia Națională a Pădurilor Romsilva - Direcția Silvică Bucureşti, available at www.curia.eu;
[31] R. Anghel, op. cit., p. 74.
[32] Ibidem, p. 75.

employer or even in the place of work[33], because during those periods the workers are not are available to the employer and do not perform any activities or functions.

3. Conclusions

Stating in its case law that characteristic features of working time must be met cumulatively, CJEU opted apparently for a restrictive interpretation of the working time definition. Even though, it is reasonable to say that in fact, looking to ensure the protection of health and safety at work as enshrined by Directive 2003/88, the Court gave more extensive interpretation of the working time notion in different cases (especially regarding on call periods) while trying to maintain a rigorous system of analysis, based on three defining features of working time, so that assessing whether a period must be or not included in working time, on case to case bases, would be a serious process with results limited to the purpose of the European Union's Directive.

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[33]For example, according to Directive 2002/15 / EC, it is rest time for mobile workers who drive the vehicle, the period spent standing by the driver or in the crate while the vehicle is in motion; in accordance with Directive 2014/112 / EU, in the case of inland waterway transport, the notion of "rest" also includes rest periods on board when the vehicle is moving or at rest; a se vedea şi R. Anghel, *Delimitarea timpului de lucru de timpul de odihnă şi remunerarea muncii suplimentare în cazul lucrătorilor mobili care desfăşoară activităţi de transport rutier,* Curierul Judiciar nr.1/2018, p.10-19.